UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE PRINCERIDGE GROUP LLC,

Plaintiff,

-against-

OPPIDAN, INC.,

Defendant.

Case No. 11 CV 1460 (AJN)

Civil Action

PLAINTIFF THE PRINCERIDGE GROUP LLC'S 56.1 STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXIST NO GENUINE ISSUE

Plaintiff the PrinceRidge Group LLC ("Plaintiff" or "PrinceRidge"), by and through its attorneys, Cole, Schotz, Meisel, Forman & Leonard, P.A., hereby submits the following Statement of Material Facts pursuant to Local Civil Rule 56.1(a), in support of PrinceRidge's motion for summary judgment pursuant to Fed. R. Civ. P. 56, on the grounds that there is no genuine issue of material fact in dispute:

The Parties

1. PrinceRidge is a FINRA regulated broker/dealer that provides, among other things, financial advisory services to corporations seeking assistance in dealing with the acquisition and disposition of assets. See Declaration of Matthew Kirsch in Support of PrinceRidge's Motion for Summary Judgment ("Kirsch Decl.") ¶ 2.

2. In the spring of 2010, Oppidan contacted PrinceRidge seeking advisory services regarding a portfolio of sixteen (16) Oppidan owned underperforming properties (the "Properties" or the "Portfolio") that were leased at that time to primarily retailers Gander Mountain and Camping World. Id.

3. Oppidan is a merchant development company that purchases land, constructs retail buildings, leases those buildings to various retailers, and then sells the buildings outright.

(See Deposition of Oppidan President Joe Ryan ("Ryan Dep.") attached to the Kirsch Decl. as Exhibit "A"; 13:3-9; 20:2-14.)

The Exclusive Engagement Agreement

4. In the Spring of 2010, PrinceRidge Managing Director Matthew Kirsch participated in a number of conference calls with Oppidan President Joe Ryan, so as to allow PrinceRidge to familiarize itself with Oppidan's business and determine the scope of services required by Oppidan. Thereafter Kirsch met with Ryan in an effort to learn about Oppidan and discuss the engagement. Ryan Dep. 34-35; Deposition of Matthew Kirsch Volume I ("Kirsch Dep. I") attached to the Kirsch Decl. as Exhibit "B"; pp. 86 – 87.

5. Those discussions revealed three potential methods of resolving the financial issues Oppidan faced at that time: 1) refinancing the existing debt; 2) renegotiating the loans with existing lenders; or 3) the disposition of the Properties through sales. (See Kirsch I 16 – 17:18 - 5, 42:15-20; Ryan Dep. 34 – 35.)

6. Ultimately it was determined that the third option, a sale of the Properties, was the best course of action. Ryan Dep. 35:14-15. PrinceRidge prepared an engagement letter that outlined the advisory services that PrinceRidge would provide (the "Exclusive Engagement Agreement").

7. On or about March 19, 2010, Kirsch forwarded a draft Exclusive Engagement Agreement to Oppidan. (See March 19, 2010 email and draft Exclusive Engagement Agreement attached to the Kirsch Decl. as Exhibit "C".) The initial draft of the Exclusive Engagement Agreement provided, in relevant part, as follows:

- Paragraph 1(a) – Oppidan agrees to retain PrinceRidge as it's "**exclusive advisor"** in connection with the "**Advisory Services"**, which were defined to include: "(i) in cooperation with [Oppidan] familiarize itself with the properties, business, operations, financial condition, management and prospects of the portfolio, (the 'Assets'); (ii) **introduce** [Oppidan] to potential buyers of the Assets; and (iii) provide such other **advisory and investment banking services** upon which the parties may mutually agree. (emphasis added)

- Paragraph 3(a) – Oppidan agrees to pay PrinceRidge 2.0% of the sales price in consideration with the "**Advisory Services**" provided in Paragraph 1(a) (the "Success Fee").

- Paragraph 3(c) - If within 18 months from the effective date of termination of the Contract, Oppidan consummates a sales transaction on any property to a buyer whom Oppidan was **introduced to by PrinceRidge or who was contacted by PrinceRidge** in connection with the Services under the Contract, then Oppidan shall pay to PrinceRidge 2.0% of the sale price of such property.

- Paragraph 15 - If PrinceRidge is successful in producing the buyer(s) that acquire any property or properties, Oppidan will pay PrinceRidge 1% for any future acquisition the buyer(s) make on any transaction with the Company for the following twelve months.

- Paragraph 5 – Oppidan agrees to indemnify PrinceRidge from and against any and all actions, expenses, claims and demands, including, without limitation, reasonable attorneys' fees and disbursements arising out of or in connection with the engagement agreement and/or the services PrinceRidge provided to Oppidan.

Id.

8. Section 3 of the Exclusive Engagement Agreement is entitled, "Compensation".

9. On or about April 16, 2010, Oppidan's in house counsel, Dave Scott, sent handwritten revisions to the Exclusive Engagement Agreement to Kirsch. (See April 16, 2010 email and revised engagement letter attached to the Kirsch Decl. as Exhibit "D".)

10. The only revisions to the operative paragraphs detailed above were: 1) the Success Fee was reduced from 2.0% to 1.85%; 2) the period of months set forth in paragraph 3(c) was reduced from 18 months to 6 months (the parties ultimately agreed to 12 months); and 3) the percentage set forth in paragraph 3(c) was reduced from 2% to 1.85%. Id.

11. The scope of the services PrinceRidge agreed to provide, including: 1) providing "other advisory and investment banking services"; and 2) contacting and introducing prospective investors to the Transaction, was not modified by Oppidan. Ryan Dep. 48:11-22. Nor was the definition of the services PrinceRidge was to provide, specifically, "Advisory Services", modified in any manner. Id. 42-43.

12. Moreover, Oppidan never requested any carve outs of any nature for companies with which Oppidan may have had a pre-existing relationship. Id. 51:1-9; 77:17-19. Lastly, the final draft of the Exclusive Engagement Agreement also contained the following:

- Paragraph 7 – Notwithstanding anything expressed or implied herein to the contrary, the terms and provisions of this Section 7 and Sections 3(c), 5, 9, 10, 11, 12 and 14 shall survive the expiration of the Agreement.

See fully executed Exclusive Engagement Agreement attached to the Kirsch Decl. as Exhibit "E".

PrinceRidge Performs Pursuant to the Exclusive Engagement Agreement

13. On or about April 20, 2010, the parties entered into the fully executed Exclusive Engagement Agreement. Id. In accordance with the Exclusive Engagement Agreement, PrinceRidge began to provide "**Advisory Services**" to Oppidan. Kirsch Decl. ¶ 10.

14. Specifically, PrinceRidge sought to identify firms and/or individuals who had available capital to deploy into the Portfolio of distressed real estate (the "Transaction"). PrinceRidge immediately commenced: 1) identifying entities interested in providing equity to a joint venture that might acquire the Properties; 2) identifying entities interested in providing loans to refinance the existing mortgages; or 3) identifying entities interested in purchasing one or all of the Properties outright. Id. at ¶ 11; Kirsch Dep. I 72:2-23; 91-92.

15. In addition to the services detailed above, PrinceRidge prepared the "discussion materials" consistent with the Exclusive Engagement Agreement to provide the requisite

information outlining the potential opportunity to clients. Kirsch Dep. I 71:2-13; (A true and accurate copy of the discussion materials is attached to the Kirsch Decl. as Exhibit "F"). The discussion materials were drafted to gauge the interest of prospective investors. Kirsch Decl. ¶ 12.

16. Over the period of months, PrinceRidge contacted eighty-four (84) separate corporate entities to discuss the Properties, and to attempt to introduce those entities to the Transaction. Kirsch Decl. ¶ 13; (A true and accurate copy of the list of entities PrinceRidge contacted is attached to the Kirsch Decl. as Exhibit "G".)

17. PrinceRidge provided many of these entities with the discussion materials PrinceRidge prepared. To the extent any of the entities had any additional questions or issues regarding the Properties, PrinceRidge instructed its clients and potential investors to contact Oppidan directly. Kirsch Dep. I 103:2-12.

18. Any bids that PrinceRidge received for the Properties were forwarded directly to Oppidan, without **any** commentary and/or guidance from PrinceRidge. Following the bid submissions, Oppidan directed PrinceRidge regarding the next steps, including whether Oppidan required additional information and/or a second round of bids. Id. 332:5-23.

PrinceRidge Introduces NRP to the Transaction

19. In connection with its Advisory Services, PrinceRidge contacted National Retail Properties ("NRP"). See Exh. "G"; Deposition of Matt Kirsch Volume II ("Kirsch Dep. II") attached to the Kirsch Decl. as Exhibit "H"; 351-352.

20. NRP is a Real Estate Investment Trust ("REIT") that invests in income producing real estate across the country. Ryan Dep. 70:18-23.

21. Kirsch was introduced to NRP in or about May, 2010, through a colleague at PrinceRidge. Kirsch Decl. at ¶ 17; Kirsch Dep. II 351:5-22.

22. Kirsch sent NRP the discussion materials, and had multiple discussions with NRP's acquisitions department, specifically, Joshua Lewis, from May to June, 2010, regarding the Properties to determine if NRP had any interest in making an investment with Oppidan. Kirsch Decl. at ¶ 17; Kirsch Dep. II 354:6-10. Lewis informed Kirsch that NRP was interested in some of the Properties, and that NRP intended to submit a bid. Kirsch Decl. at ¶ 18. Lewis directed Kirsch to contact NRP's senior executive vice president, Jay Bastian, to continue the process. Id.

23. On June 24, 2010, Kirsch emailed Bastian and advised him that first round bids were due on June 25, 2010. Id. at ¶ 19; (A true and accurate copy of Kirsch's June 24, 2010 email is attached to the Kirsch Decl. as Exhibit "I").

24. On June 25, 2010, Bastian emailed Kirsch. In that email, Bastian never indicated that NRP was not interested in the Properties. Bastian also never indicated that NRP was not going bid on the Properties. Rather, Bastian abruptly informed Kirsch that NRP would not "be participating in [PrinceRidge's] process". Id.

25. Accordingly, Kirsch called Ryan to inquire if he knew why NRP chose not to "participate in [PrinceRidge's] process". Kirsch Decl. at ¶ 20; Kirsch Dep. II 356:7-25. Ryan informed Kirsch that Bastian was mistaken, and that Kirsch should continue to discuss the Transaction with NRP. Ryan stated that he had directed NRP to continue to speak with PrinceRidge, and participate in PrinceRidge's process. Kirsch Decl. at ¶ 20; Kirsch Dep. II 356-357.

26. As of June 25, 2010, however, NRP did not submit a bid for any of the Properties. See Kirsch Decl. at ¶ 21. Rather, Kirsch learned that NRP's head of acquisitions was conveniently in Minnesota at or about that time meeting with Gander Mountain and Camping World. See Email between Joe Ryan and Jay Bastian dated June 30, 2010 confirming that NRP was meeting with Gander Mountain attached to the Kirsch Decl. as Exhibit "J".

27. As a result of NRP's actions, Kirsch and others at PrinceRidge grew concerned that Oppidan was seeking to deny PrinceRidge's right to a Success Fee. (See emails between Kirsch and PrinceRidge Managing Director and Senior Salesperson Tom Connors dated June 28, 2010 and July 7, 2010, attached to the Kirsch Decl. as Exhibit "K".)

NRP Purchases Ten (10) Properties from Oppidan for Over $100 Million

28. On July 26, 2010, NRP sent a Letter of Intent ("LOI") to Oppidan indicating its intent to purchase five (5) Properties for $50,470,996.00. Kirsch Decl. ¶ 23; (A true and accurate copy of the July 26, 2010 LOI is attached to the Kirsch Decl. as Exhibit "L"); Ryan Dep. 86:6-17. On or about August 17, 2010, NRP and Oppidan entered into a Real Estate Purchase and Sale Contract ("Contract 1"). Kirsch Decl. ¶ 24; (A true and accurate copy of Contract 1 is attached to the Kirsch Decl. as Exhibit "M").

29. The entities identified as the seller that include the acronym "KTJ", are all entities owned and controlled by Oppidan. Ryan Dep. 19:8-13.

30. Contract 1 represents the consummation of the sale of the Properties contemplated by the July 26, 2010 LOI. Ryan Dep. 87:1-8. The Properties identified in Contract 1 are contained in the Portfolio included in the Exclusive Engagement Agreement. Ryan Dep. 83-84.

31. Pursuant to the Sixth Amendment to Contract 1, the final purchase price of the Properties was $50,370,996. Kirsch Decl. ¶ 25; (A true and accurate copy of the Sixth Amendment to Contract 1 is attached to the Kirsch Decl. as Exhibit "N").

32. On June 6, 2011, NRP sent another LOI to Oppidan indicating its intent to purchase five (5) **additional** Properties for $50,395,638. Kirsch Decl. ¶ 26; (A true and accurate copy of the June 6, 2011 LOI is attached to the Kirsch Decl. as Exhibit "O"); Ryan Dep. 91-92.

33. On or about June 15, 2011, NRP and Oppidan entered into another Real Estate Purchase and Sale Contract ("Contract 2"). Kirsch Decl. ¶ 26; (A true and accurate copy of Contract 2 is attached to the Kirsch Decl. as Exhibit "P").

34. The entities identified as the seller that include the acronym "KTJ", are all entities owned and controlled by Oppidan. Ryan Dep. 94:4-9.

35. Contract 2 represents the consummation of the sale of the Properties contemplated by the June 6, 2011 LOI. Ryan Dep. 93:18-22.

36. The Properties identified in Contract 2 are set forth in the Portfolio, and included in the Exclusive Engagement Agreement. Ryan Dep. 91-92. The final purchase price of the Properties contained in Contract 2 was $50,395,638. Kirsch Decl. ¶ 27; Exh. "P".

Oppidan Breached the Exclusive Engagement Agreement

37. Despite consummating the transactions detailed above, and in complete disregard of PrinceRidge's demands, Oppidan failed to make the requisite payment due to PrinceRidge pursuant to the Exclusive Engagement Agreement. Ryan Dep. 53:1-6. PrinceRidge duly demanded payment, but Oppidan flat out refused. Kirsch Decl. ¶ 28.

38. At his deposition, Ryan himself acknowledged that if PrinceRidge introduced Oppidan to the Transactions detailed above, and a sale was consummated, PrinceRidge would have been entitled to its Success Fee. Ryan Dep. 90-91.

39. Despite that candid acknowledgment, Oppidan never made payment and, to date, Oppidan has **never** communicated any reason whatsoever directly to PrinceRidge for its failure to pay PrinceRidge the Success Fee to which it is entitled pursuant to the Exclusive Engagement Agreement. Kirsch Decl. ¶ 29.

40. In March, 2011, Oppidan drafted a "Pipeline Report". Ryan testified that a Pipeline Report is an internal Oppidan document that reports on projects that Oppidan is engaged in and their level of progress. Ryan Dep. 97:10-13. The March 13, 2011, report contains an entry that states, "Portfolio to NNN – JR – Be careful with NY guys". (A true and accurate copy of the March 13, 2011 Pipeline Report is attached to the Kirsch Decl. as Exhibit "Q".)

41. Ryan testified that "Portfolio to NNN" refers to a sale of Properties to NRP, and that "JR" refers to him. Ryan Dep. 98:12-25. When questioned whether "Be careful with NY guys" refers to PrinceRidge, Ryan testified "It might be PrinceRidge. It might not be. I don't know." Id. 99:13-16. When asked whether Ryan had any discussions with anybody at Oppidan regarding whether Oppidan had to "Be careful with NY guys", Ryan stated, "Yeah, I don't recall."

Transactions Entered Into Between Oppidan and Other Entities PrinceRidge Contacted Pursuant to the Exclusive Engagement Agreement

42. As of 2010, Oppidan sold at least one other Property contained in the portfolio, the College Station property, to The Inland Real Estate Group of Companies, Inc. Inland was one of the companies that PrinceRidge contacted regarding the portfolio. Ryan Dep. 128:2-15.

Moreover, Ryan testified at his deposition that since April of 2010, Oppidan has conducted business in some form or another with Cole Capital, Dougherty Funding, and Kimco. Ryan Dep. 123:21-23; 125:11-15; 129:1-7.

PrinceRidge Was Not Acting As A Broker

43. As set forth above, Oppidan retained PrinceRidge's Advisory Services in the spring of 2010, because it unsuccessfully sought to sell the Properties through its network of real estate brokers. Kirsch Decl. ¶ 31; Ryan Dep. 21:10-16.

44. Attached to the Kirsch Decl. as Exhibit "R", are numerous examples of brokerage agreements Oppidan entered into with Stan Johnson Company ("Stan Johnson") and Upland Real Estate ("Upland") (the "Brokerage Agreements").

45. Stan Johnson's website confirms that they are a real estate broker. (A true and accurate copy of a portion of Stan Johnson's website is attached to the Kirsch Decl. as Exhibit "R".) Upland's website confirms the same. (A true and accurate copy of a portion of Upland's website is attached to the Kirsch Decl. as Exhibit "T".)

46. By contrast PrinceRidge's website describes PrinceRidge as a "full service investment bank with the experience and capital base necessary to provide trusted advice, intelligent solutions and superior execution to middle-market and small-cap clients." (A true and accurate copy of PrinceRidge's website is attached to the Kirsch Decl. as Exhibit "U".)

47. The engagement agreement Oppidan entered into with PrinceRidge, seeking PrinceRidge's "Advisory Services", is very different than Oppidan's real estate Brokerage Agreements in three (3) critical respects. First, each of the Brokerage Agreements define the party Oppidan is hiring as a "**broker**". Not one of them identifies the party that Oppidan is retaining as an "advisor". See Kirsch Decl. ¶ 33; Exh. "R".

48. Second, each of the Brokerage Agreements state that Oppidan "employs Broker as its exclusive agent to procure purchasers for [a property]. Broker is authorized to sell the [property]. . ." Id. None of this critical language applicable to brokerage agreements entered into by Oppidan, appears in the Exclusive Engagement Agreement with PrinceRidge. Kirsch Decl. ¶ 34; Exh "E".

49. Third, each of the Brokerage Agreements describes the broker's fee as a "commission". This is unlike the Exclusive Engagement Agreement, which defines PrinceRidge's fee as "compensation". See Kirsch Decl. ¶ 35; Exs "R" & "E".

50. These terms are very different. Webster's dictionary defines "commission" as "a fee paid to an agent or employee for transacting a piece of business or performing a service". See Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/commission; Kirsch Decl. ¶ 35. The critical language in that definition, of course, is, "transacting a piece of business".

51. Here, the Exclusive Engagement Agreement does not authorize PrinceRidge to "transact" anything. PrinceRidge did **not** have the authority to negotiate anything with any of the prospective investors, nor did PrinceRidge have the authority to bind Oppidan to a contract. See Kirsch Decl. ¶ 36.

52. Rather, the Exclusive Engagement Agreement is clear that the principle task PrinceRidge was asked to perform was to identify potential buyers; introduce them to the Transaction; and perform other advisory or investment banking services as may be mutually agreed upon. Unlike a broker, PrinceRidge was **not** involved whatsoever in the negotiation of the Transaction. Kirsch Dep. I 163:9-16.

53. Notwithstanding PrinceRidge's performance as detailed above, Oppidan has never made any payments whatsoever to PrinceRidge pursuant to any of the provisions contained in the Exclusive Engagement Agreement. Ryan Dep. 53:1-18.

DATED: New York, New York
March 18, 2013

Respectfully submitted,

COLE, SCHOTZ, MEISEL,
FORMAN & LEONARD, P.A.
A Professional Corporation
Attorneys for Plaintiff, The PrinceRidge Group LLC

By: /s/ Leo V. Leyva
Leo V. Leyva
Cole, Schotz, Meisel,
Forman & Leonard, P.A.
A Professional Corporation
900 Third Avenue, 16th floor
New York, NY 10022-4728
(212) 752-8000
(212) 752-8393 (fax)